Supreme Court, U.S.
FILED
APR 9 1992
OFFICE OF THE CLERK

(2)

No. 91-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

vs.

CLAIRE'S BOUTIQUES, INC., d/b/a CLAIRE'S BOUTIQUES, and d/b/a ARCADIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW H. BART
(Counsel of Record)
LONNIE COLEMAN
PRYOR, CASHMAN, SHERMAN & FLYNN
410 Park Avenue
New York, New York 10022
(212) 421-4100

April 9, 1992

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly rejected petitioners' novel legal theory that individuals or corporations which own more than one retail establishment are ineligible for the statutory exemption contained in 17 U.S.C. §110(5) which permits retailers to play home-type radios in their stores without the need for a public performance license?

2. Whether the Seventh Circuit correctly ruled that a store's eligibility for the statutory exemption contained in 17 U.S.C. §110(5) should be judged by applying the explicit language of the statute, rather than policies expressed in legislative history but not incorporated within the language of the statute?

3. Whether the Seventh Circuit correctly ruled that "further transmission" by a retailer which exceeds the scope of the exemption contained in 17 U.S.C. §110(5) must entail more than simply connecting a receiver to two speakers by means of speaker wire run through a wall?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF CASE	1
1. The Parties	4
2. Claire's Receiving Apparatus	4
I. REASONS FOR DENYING THE WRIT	6
II. ARGUMENT	6
A. The Seventh Circuit's Rejection Of Petitioners' Novel Interpretation of A "Single Receiving Apparatus" Was Correct and Proper	6
B. The Seventh Circuit Properly Refused To Consider Factors Contained In The Legislative History But Not Enacted Into The Statute	9
C. The Seventh Circuit Correctly Held That Claire's Does Not Further Transmit Radio Broadcasts	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Broadcast Music, Inc. v. United States Shoe Corp., 678 F.2d 816 (9th Cir. 1982)	10
Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931)	13
Gnossos Music v. DiPompo, 13 U.S.P.Q.2d 1539 (D. Maine 1989)	11, 13
Hickory Grove Music v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990)	11
In re Sinclair, 870 F.2d 1340 (7th Cir. 1989)	10
International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988)	10, 13
Lamminations Music v. P&X Markets, Inc., 1985 Copyright L. Dec. (CCH) 19,555, ¶ (25,790) (N.D. Cal. 1985)	11
Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172 (W.D. Tex. 1988)	11
Rodgers v. Eighty Four Lumber Company, 617 F. Supp. 1021 (W.D.Pa. 1985)	11
Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982)	11
Statutes	
17 U.S.C. §110(5)	*passim*

No. 91-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

vs.

CLAIRE'S BOUTIQUES, INC., d/b/a
CLAIRE'S BOUTIQUES, and d/b/a ARCADIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement Of Case

This case arises from an aggressive attempt by petitioners to dramatically expand the scope of their licensing of public performances of musical compositions through judicial amendment of one section of the copyright law. 17 U.S.C. Section 110(5) exempts retailers from the obligation of obtaining licenses for the public performance of radio broadcasts received in stores as long as each reception is made by a single receiving apparatus of a kind commonly found in the home, no charge is imposed

by the retailer and there is no further transmission. Petitioners initiated this action to obtain a judicial declaration that any company which operates retail stores in more than one location is ineligible for the 17 U.S.C. §110(5) exemption since it would operate more than "a single receiving apparatus".

Prior to the commencement of this action, no court had ever considered the issue as to whether common ownership of more than one commercial establishment precluded application of the §110(5) exemption. Indeed, neither BMI nor any other performing rights society had ever asked a court to accept such an interpretation prior to this case. Thus, it is extremely disingenuous for BMI to suggest that the Seventh Circuit's rejection of this novel legal theory presents a conflict among the courts or presents issues warranting the issuance of a writ of certiorari by this Court.

On July 12, 1990, Broadcast Music, Inc. ("BMI") served a complaint upon Claire's Boutique's, Inc. ("Claire's") alleging 88 counts of copyright infringement arising out of Claire's use of home-type stereo equipment to receive radio broadcasts in its stores. Claire's filed its answer on September 5, 1990 interposing two counterclaims, one of which sought a judgment declaring Claire's exempt from licensing requirements pursuant to 17 U.S.C. §110(5). The parties agreed to stipulated facts (App. D and E) and presented the case to the District Court on joint motions for summary judgment.

By decision dated December 28, 1990 the United States District Court for the Northern District of Illinois, Rovner J., rejected BMI's claims of copyright infringement and held that Claire's stores are exempt from licensing requirements under the terms of 17 U.S.C. §110(5). After careful analysis, the District Court held that the single receiving apparatus operated in each of Claire's stores was "of a kind commonly used in private homes," and that there was no further transmission of the broadcast. Accordingly the Court ruled that Claire's conduct did not constitute copyright infringement.

BMI appealed to the Seventh Circuit Court of Appeals, which affirmed Judge Rovner's decision on December 11, 1991. The

Seventh Circuit applied the tests set forth in §110(5) and agreed with Judge Rovner that each Claire's store received broadcasts on a single receiving apparatus of a kind commonly used in private homes and did not further transmit the broadcast.

Further, the Seventh Circuit rejected BMI's contention that chains or commonly owned stores are automatically outside of the exemption because, in the aggregate, they operate more than one receiving apparatus. The Seventh Circuit held that §110(5) looks only to the area where a single work is performed and thus looks only to the individual store in determining whether the "single receiving apparatus" test is met.

BMI apparently selected Claire's as a test case for its novel legal interpretation of "a single receiving apparatus" because BMI believed that Claire's was not a small business and therefore not eligible for the §110(5) exemption. It is undisputed that §110(5) does not contain any references to small businesses or the financial size or corporate structure of ownership. It is similarly undisputed that the legislative history of this section contains references to a desire to exempt small businesses from licensing requirements. Several courts, in explaining decisions compelled under the language of §110(5), have referred to this legislative history as indicative of congressional intent.

In its initial papers to the District Court, Claire's contended that, on an individual store-by-store basis, it was a small business which qualified for the exemption. However, Judge Rovner, and subsequently the Seventh Circuit, ruled that policy statements contained in legislative history were irrelevant to the issues presented by this litigation. Since those congressional statements were not enacted in the statute and were not necessary to understand ambiguous statutory provisions, they had no bearing on the issues posed by this litigation.

Both the District Court and the Seventh Circuit recognized that Congress chose to draft the text of the exemption in terms of the type of radio equipment used to receive the broadcast and the nature of the transmission, and not the financial condition or size of the business. Both Courts refused to elevate

references to small businesses in the legislative history to independent supplemental tests which could change determinations compelled by the standards set forth in the statute.

1. The Parties

Respondent Claire's Boutiques, Inc. operates a chain of retail stores under the names Claire's Boutiques and Arcadia. (App. 55a, ¶2).

The average size of each Claire's Boutiques store is 861 square feet. (App. 27a) Claire's Boutiques stores averaged $264,861 in net sales and $20,986 in net profits during fiscal year 1990. (App. 27a)

The average size of each Arcadia store is 2022 square feet. (App. 27a) Arcadia stores averaged $126,381 in net sales and $15,870 in net profits during the last quarter of fiscal year 1990, which included the Christmas shopping season. (App. 27a)

Petitioner Broadcast Music, Inc. ("BMI") is a performing rights licensing representative that licenses approximately one and one-half million copyrighted musical works. (App. 51a, ¶2). While BMI repeatedly cites its status as a non-profit organization seeking to reward the creativity of songwriters, BMI competes with other performing rights societies and its performance is measured by revenues generated. Accordingly, BMI sets revenue goals, devotes substantial energy to devising ways to increase revenues and places certain employees on commission programs which depend on the volume of licenses generated.

2. Claire's Receiving Apparatus

Each Claire's store receives radio broadcasts during store hours by means of a single Radio Shack Optimus STA-20, AM/FM stereo receiver. (App. 27a) The receiver has a list price of $129.95 and delivers only

5 watts of power, far less than many sold for private use. (App. 57a) It also sells for a price lower than many receivers sold for private use. (App. 36a) The receiver used by Claire's is not integrated with public address systems, telephone lines or other stereo equipment. It plays only unaltered radio broadcasts. (App. 38a) The manager of each individual store independently determines which radio broadcasts will be heard in the store.

The receiver has two jacks for connection of no more than two speakers and does not contain built in speakers. (App. 57a) As a result, two external speakers must be connected to the receiver by use of speaker wire in order for the receiver to function. (App. 27a)

The receiver is kept on a shelf in the storage room or closet and is connected by speaker wire to two Realistic Minimus 7 speakers which measure 6 inches x 6 inches x 8 inches. (App. 28a) The speakers have a list price of $49.95 each, and are designed to sit on a table or hang from a wall or ceiling. (App. 28a) The speakers are small and are clearly designed for private home use. (App. 36a)

The two speakers hang from the ceiling over the selling area of each store (App. 28a), and no speakers are located in the storage room or closet, or anywhere else on the premises. (App. 57a, ¶¶13, 15) One speaker is located between 5 and 15 feet from the receiver and the other speaker is located between 20 and 35 feet from the receiver. (App. 58a, ¶17) Claire's stores have decorative dropped ceilings, with a grid composed of lights running just below the dropped ceiling. (App. 28a) The two speakers hang from the dropped ceiling and drop down to a point approximately 6 inches above the light grid. (App. 28a) They are not "recessed", as alleged in the Petition.

> Each speaker is connected to the receiver by a strand of speaker wire that runs from the speaker above the dropped ceiling through a small hole into the storage room or closet and along the exterior of the wall to the shelf where the receiver is located. The speaker wire is then connected to the back of the receiver. (App. 29a)

I. REASONS FOR DENYING THE WRIT

Respondent respectfully requests that this Court decline to issue a writ of certiorari to review the decision of the Seventh Circuit. The Seventh Circuit's interpretation of "single receiving apparatus" is not inconsistent with the interpretation of any other circuit or of the plain meaning of the statute.

The decisions of the District Court and Seventh Circuit are based on the clear statutory language of §110(5). Application of the statutory tests and reasoning applied by the Seventh Circuit would not compel a contrary result in any previous district or circuit court decision. Indeed, the uniformity sought by petitioners can best be provided by adherence to statutory tests rather than by supplementing them with subjective, undefined policy statements contained in congressional debates and committee reports.

II. ARGUMENT

A. The Seventh Circuit's Rejection Of Petitioners' Novel Interpretation Of A "Single Receiving Apparatus" Was Correct And Proper.

In no prior case has BMI or any other performing rights society ever argued that mere ownership of multiple retail establishments precluded application of the §110(5) exemption. Indeed, in numerous cases decided by circuit and district courts in favor of the performing rights societies under §110(5), no court ever discussed whether multiple ownership of retail establishments precluded application of the statutory exemption. Since BMI's definition of a "single receiving apparatus" would have been dispositive of many of these cases, the absence of any discussion on the issue was not coincidental. Instead, it reflected the fact that no party considered

the term to be ambiguous or to contain any reference to common ownership of separate retail establishments. Rather, the exemption was interpreted in terms of the type of equipment utilized by each retail establishment. Accordingly, BMI's assertion that the Seventh Circuit's decision constitutes a radical departure from an unbroken line of precedent is simply false. Indeed, it is BMI that seeks a radical departure from prior decisions when it asserts preclusion of any application of §110(5) to multi-store operations.

Not surprisingly, the four pages of BMI's petition (pages 13-17) which address the "single receiving apparatus" argument fail to cite a single case or even any legislative history. Rather, BMI attempts to defend its new definition in two ways.

First, it asserts that the statute's failure to say "single receiving apparatus at a single geographic location" compels the conclusion that the issue of location was debated and rejected by Congress. Claire's submits that there is no reason to assume that the failure to include language concerning a "single geographic location" was discussed by Congress. Rather, it is logical to infer that Congress intended that the exemption be analyzed with respect to separate performances. Thus, the single receiving apparatus in §110(5) refers to the equipment responsible for each performance and does not address separate, independent performances by the same owner.

Second, BMI asserts, without any factual basis, that "very few, if any retail establishments would use two receivers to receive the same transmission at the same location." Not only is this statement factually unsupported, it is meaningless. Even if a statutory test proves of limited utility, it may not be subsequently reinterpreted by the courts to give it a meaning uncontemplated by anyone for thirteen years following the passage of the Act.

Recognizing the futility of defending its novel and creative definition of a "single receiving apparatus", BMI constructs a tortured reading of the Seventh Circuit's decision from which it erroneously suggests that the Seventh Circuit has imposed new, improper tests upon the copyright owner to disprove the §110(5) exemption.

The simple fact is that the Seventh Circuit ruled that the "single receiving apparatus" test applies to each retail operation and not to its owner. No tests or burdens were imposed on the copyright owner. The Seventh Circuit decision does not require, as petitioners allege, "that a copyright owner must now establish that a music user is acting like a broadcaster and receiving more than minimal benefits from the infringement." Rather, as in all previous decisions, the Seventh Circuit imposed on Claire's the burden of demonstrating that it receives regular radio signals on a single receiving apparatus of a kind commonly found in the home without charge or further transmission. The Seventh Circuit went beyond the facts of this case in its analysis of a "single receiving apparatus". It anticipated that there might be circumstances, not presented by this case, which might permit a finding that common ownership of more than one retail establishment might violate the "single receiving apparatus" test. Specifically, the Court indicated that if a retailer transmitted the same broadcast to each of its stores or directed managers to tune to a particular station, it might be operating more as a broadcaster than a retailer and thus might not satisfy the statute. However, that discussion was hypothetical and discussed issues beyond those presented by this case.

BMI's rationale for misinterpreting the Seventh Circuit is obvious. BMI would like to suggest that the Seventh Circuit is engaged in improper judicial activism by effectively redrafting the legislation. However, the Seventh Circuit has rigorously interpreted that statute as drafted and has rejected attempts at judicial legislation utilized by other courts in interpreting this statute.

As with other issues presented in this case, BMI's argument raises issues addressed to legislative draftsmanship and not to judicial interpretation. Congress decided to draft the test in terms of the type of equipment and transmission used by each retail establishment. If a retail establishment uses a single receiving apparatus and uses equipment commonly found in the home and does not further transmit that broadcast, it is exempt under the statute. If BMI believes that such a statutory scheme does

not adequately address the concerns discussed by Congress, its remedy lies with Congress and not with the courts.

The fact that BMI's true concerns are legislative, not judicial, is evidenced by the frequent policy arguments it cites. Protection of creativity and potential revenue losses are not appropriate considerations for judicial review of the statute. Moreover, the practical anomalies generated by the interpretation advocated by BMI further evidence the need for legislative debate on these issues. Under BMI's interpretation, two corner newsstands owned by the same individual which generate minimal revenue would still be outside the scope of the exemption due to common ownership. Further, stores in the same shopping mall with identical products, revenues, size and stereos may have different licensing requirements depending upon on whether one is a member of a chain and one is a sole proprietorship. These are all issues to be decided by Congress and not by the courts. Congress has decided to define the scope of the exemption by looking at the type of equipment used for each broadcast. Accordingly, the use of multiple receivers or multiple sets of speakers at each location or augmentation by paging or public address systems would take the operation outside the scope of the statute.

The statute must be interpreted as drafted. As noted above, no previous court has ever accepted (or even considered) the interpretation of a "single receiving apparatus" being advocated by BMI. Accordingly, the Seventh Circuit's refusal to accept BMI's proposed definition is hardly a departure from precedent, but rather a decision consistent with the statutory language and prior decisions.

B. The Seventh Circuit Properly Refused To Consider Factors Contained In The Legislative History But Not Enacted Into The Statute

In commencing this action, petitioners believed that they had a safe fall-back position in that even if their novel definition of "single receiving apparatus" was rejected, Claire's would still be ineligible for the exemption because it was not a small

business. The District Court and the Seventh Circuit rejected this argument as well, however, deciding that

> Congress chose to effectuate (the intent to exempt small commercial establishments) by drawing a distinction based on the type of sound equipment utilized in the nature of the transmission.

In addition, the Seventh Circuit went on to note that

> Any rule developed under §110(5) based on the financial strength of the company seeking the exemption would be directly contrary to the terms of the statute. The statute speaks only of 1) the number of receiving apparatuses used, 2) whether the sound system is of a type commonly used in private homes, 3) whether music is further transmitted, and 4) whether admission was charged. Legislative history cannot be used to invent rules totally unrelated to the language of the statute. It is appropriate instead for the purpose of clarifying an ambiguous statute or, what is often the same thing, applying the statute to a situation not clearly foreseen by the drafters of the statute. *In re Sinclair* 870 F.2nd 1340 (7th Cir. 1989).

The Seventh Circuit conceded that certain court decisions have specifically applied "small business" or "background music" tests extrapolated from the legislative history of the statute. However, as the Seventh Circuit stated, these cases relied independently on an analysis of the stereo system that was installed in the store. The two circuit court cases* referred to in petitioners' submission to this Court are indicative of this approach. In *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2nd 816 (9th Cir. 1982), the Court held that defendant failed to qualify for the exemption because the store had a commercial system with

---

* While petitioners also refer to *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd.* 855 F. 2nd 375 (7th Cir. 1988), the only issue on appeal was the imposition of damages for willful infringement. Given the fact that the receiver in *Kowalczyk* had paging capacity and was connected to eight speakers located in different rooms, it clearly violated the statute.

widely separated speakers of a type not commonly found in the home. In *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd* 668 F.2nd 84 (2nd Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) the Court considered the type of stereo transmission utilized by the defendants and concluded that four to seven speakers recessed behind wire grids over a very large area was not indicative of a stereo system of a type commonly found in the home, and that defendants engaged in further transmission of the communication.

In addition, the Seventh Circuit noted that the district court decisions relied on by BMI similarly did not rest solely on the defendant's size, revenue or ability to subscribe to a background music system. In *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D.Pa. 1985), the owner of the stores connected the receivers to microphones and amplifiers, mounted speakers throughout and outside of the stores, and placed most of the speakers 150 feet from the receivers. The systems also featured public address capabilities. In *Lamminations Music v. P&X Markets Inc.*, 1985 Copyright L.Dec. (CCH) 19,555 ¶25, 790 (N.D.Cal. 1985) the stores involved were grocery stores which had stereo systems adapted to the size of each store, with anywhere from six to ten ceiling mounted speakers which were widely separated from the receivers. In *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990), the defendant had a system which included a cassette deck and five recessed ceiling speakers with speaker wire twice as long as Claire's. In addition, the system had originally been designed as a public address system. In *Gnossos Music v. DiPompo*, 13 U.S.P.Q. 2nd 1539 (D.Maine 1989), the defendant restaurant owner had connected the stereo in the lobby to eight to ten recessed speakers which transmitted music throughout the various dining rooms and the lobby.

BMI places undue reliance on the anomalous case of *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Texas 1988). However, that case involved a system with unfinished speakers spaced 30 feet apart and 40 feet from the receiver which were hidden inside ceiling grills and over which music had formerly been transmitted by a background music service.

A proper use of legislative history and rejection of a rule based on the financial strength of the defendant would not produce a different result in any of the cases cited by BMI. In fact, rejection of a rule based on the financial strength of the defendant provides some consistency and some adherence to a rule of law as it is based upon the tests actually imposed by Congress, rather than on congressional debates and reports that took place prior to enactment of the statute.

Ultimately, it is not surprising that BMI argues policy issues and describes the millions of dollars which will allegedly be lost as a result of the Seventh Circuit's decision and the potential impact on songwriters and publishers from this loss of revenue. However, the Copyright Law reflects a balancing of interests. It reflects an interest in compensating creativity, but also reflects an interest in protecting incidental uses of music from undue governmental interference and taxation. With regard to the playing of radio broadcasts by a retailer, Congress decided to define the line in terms of the stereos used by the retailers. Judicial incorporation of a "small business" or "background music" test would not only needlessly amend the clear language of the statute but would require courts in the future to make differentiations on the basis of gross revenues, square footage and commercial operations without any assistance from Congress in deciding the appropriate dividing lines.

Claire's submits that the Seventh Circuit's decision does not conflict with congressional intent. Indeed, on a store-by-store basis, Claire's playing of radio broadcasts is precisely the type contemplated as being exempt by Congress. Claire's are small individual stores with simple home-type equipment. The fact that each Claire's store is part of a commonly owned chain operation does not change the nature of each store's operation or the nature of the transmission. Indeed, in many shopping malls, Claire's faces competition from sole proprietorships operating similar stores. The rule advocated by BMI would require Claire's to pay licensing fees while exempting such sole proprietorships from similar requirements, even if they have similar or greater square footage or revenues on a store-by-store basis.

C. The Seventh Circuit Correctly Held That Claire's Does Not Further Transmit Radio Broadcasts

Both the District Court and the Seventh Circuit correctly held that adoption of BMI's definition of further transmission would eviscerate the exemption. (App. 27a) It is simply illogical to argue that a speakerless radio receiver hooked up to two speakers can constitute further transmission of radio broadcasts. Under such an interpretation, no radio reception could ever be exempt once speakers were attached to the receiver to make the broadcast audible.

Moreover, the Seventh Circuit correctly rejected BMI's assertion that the placement of the receiver in a back room separate from the selling area creates a further transmission. (App. 24a) The Seventh Circuit recognized that "the nature of the transmission" does not change simply because the speaker wire happens to pass over or through a wall on its way to the speakers. (App. 24a)

BMI's assertion that the Seventh Circuit radically departed from an unbroken line of precedent is belied by these precedents. Starting with *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931) and continuing in *International Korwin Corp. v. Kowalczyk*, *supra*, and *Gnossos Music v. DiPompo*, *supra*, courts have attempted to preclude proprietors from funneling radio broadcasts from one location to a number of different locations by means of numerous speakers. In both *Kowalczyk* and *Gnossos Music* broadcasts were piped from one receiving location to various dining rooms in such a manner that several transmissions of the original signal occurred.

In recognition of the above, the Seventh Circuit held that further transmitting a performance must entail "the use of some device or process that expands the normal limits of the receiver's capabilities". (App. 24a) The Seventh Circuit correctly recognized that none of the precedents cited by BMI relied solely on their finding of further transmission. (App. 24a, 25a) In all of the cases cited by BMI, the act of piping music into a number of rooms required the use of numerous speakers and extensive

wiring, which act by itself made the receiving apparatus not of the kind commonly found in the home.

Finally, the Seventh Circuit correctly noted that if Congress had wanted to impose a rule requiring speakers to be in the same room as the receiver it could have so provided in the statute. Once again, the Seventh Circuit rejected BMI's attempt to impose new rules that do not exist in the statute. Contrary to BMI's assertion, there is no need for this Court to review the Seventh Circuit's holding that Claire's did not further transmit radio broadcasts. Indeed, this is hardly the type of issue warranting Supreme Court review. The Seventh Circuit's decision is consistent with prior precedent and is the only logical application of the rule.

CONCLUSION

This Court should decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit since that judgment is consistent with the language of the relevant statute and is not inconsistent with prior decisions interpreting 17 U.S.C. §110(5). Further, petitioners' request is essentially legislative and does not belong on the docket of this Court.

Respectfully submitted,

ANDREW H. BART
LONNIE COLEMAN
PRYOR, CASHMAN, SHERMAN & FLYNN
410 Park Avenue
New York, New York 10022
(212)421-4100

April 9, 1992